UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSEIL ALAIN ABOUDARAM, S.A., **Plaintiff,** **v.** **JACQUES DE GROOTE,** **Defendant.**	**Civil Action No. 01-0006 (JDB)**

MEMORANDUM OPINION

In this action for breach of contract, Conseil Alain Aboudaram, S.A. ("CAASA") seeks to enforce two promissory notes under which it agreed to lend funds to Jacques de Groote ("de Groote") and took a security interest in one of de Groote's residences. De Groote asserted, in various counterclaims, that his debt to CAASA was more than offset by commissions due to him for his participation in certain of CAASA's business ventures. After a five-day trial, a jury found that there was an enforceable contract between the parties as to the promissory notes, that de Groote had breached the contract by defaulting in payment, and that CAASA was entitled to $536,263.55 in damages. The jury rejected de Groote's counterclaims.

The issue now before the Court arises from the fact that, although he is neither named as a plaintiff in this case nor as a lender on the promissory notes, Alain Aboudaram ("Aboudaram"), CAASA's principal shareholder, claims to have himself made advances to de Groote enforceable under the notes. Indeed, the jury's award clearly reflects monies that all concede were loaned by Aboudaram in his personal capacity to de Groote. Notwithstanding the language of the

promissory notes – which identifies CAASA, not Aboudaram, as the lender and payee – Aboudaram insists that the parties intended the notes to cover funds advanced both by CAASA and by him personally. Accordingly, CAASA has moved to amend its complaint to conform to the evidence presented at trial and for reformation of the promissory notes. De Groote has moved for judgment under FED. R. CIV. P. 50(b), claiming that the promissory notes on their face do not encompass the monies he owes to Aboudaram, and that he has repaid the entire debt to CAASA embodied in the notes.

BACKGROUND

CAASA, a Swiss corporation with its principal place of business in Lausanne, is a financial consulting company. It provides advisory services and arranges trade finance for industry and government clients in many countries. See Trial Transcript ("Tr.") Feb. 26, 2004, at 27.[1] Aboudaram and members of his family own substantially all of the company's stock, and he is its president. Aboudaram met de Groote, a Belgian national and one-time Executive Director of both the World Bank and the International Monetary Fund, in 1990. Id. at 32. Over the next several years, de Groote introduced Aboudaram to various business contacts in the developing world and international finance community. According to Aboudaram, he and de Groote had a loose understanding whereby, in exchange for introductions and information about business opportunities, Aboudaram periodically helped de Groote meet his personal financial obligations. See id. at 42-45. The parties did not understand this to be a binding commitment. Id.

Among de Groote's obligations was a mortgage on his home in Washington, D.C. Aboudaram testified at trial that, after de Groote had been notified that he was in default on the

[1] Citations are to the rough transcript available to the Court.

mortgage in 1991 or 1992, de Groote asked Aboudaram to intervene on his behalf with the mortgage lender. Id. at 49. Aboudaram did so, and proceeded over the following years to help de Groote make his mortgage payments. See Tr. Feb. 23, 2004, at 7; Tr. Feb. 26, 2004, at 50. Between 1994 and 1998, Aboudaram's payments to de Groote in connection with the mortgage totaled $396,357.59. Stipulated Ex. 2. Aboudaram testified repeatedly that these payments were personal loans, see Tr. Feb. 23, 2004, at 60, and de Groote has conceded that he continues to owe repayment of these loans to Aboudaram, see Tr. Feb. 24, 2004, at 55.

In addition to de Groote's personal dealings with Aboudaram, de Groote had a professional consulting relationship with CAASA. CAASA's business records contain an account for de Groote, which shows a stream of payments to him for his services in connection with various transactions during the 1990s, amounting to $1,400,119.76. See Stipulated Ex. 1C; Tr. Feb. 26, 2004, at 50.[2] At trial, de Groote claimed that among these transactions was CAASA's representation of SkodaExport, a Czech company. Skodaexport sought financial advice in reducing its tax liability to the Czech government and to obtain a contract through the World Bank to build an oil pipeline in India. Tr. Feb. 24, 2004, at 139-40. Presumably relying on his contacts, de Groote obtained a copy of a relevant study that the World Bank had done in India, explored the status of the project at the World Bank, determined how much money had been earmarked for it, identified SkodaExport's potential competitors, and introduced Aboudaram to the World Bank official in charge of the project. Tr. Feb. 26, 2004, at 64-65. De Groote testified that, in return, he

[2] De Groote testified that, at Aboudaram's request, Aboudaram's personal advances to de Groote were not recorded in CAASA's books, nor did Aboudaram's personal records reflect payments to de Groote from CAASA. See id. at 31-32.

was to receive one-third of the fees paid by SkodaExport to CAASA.[3] Tr. Feb. 24, 2004, at 140-41. CAASA has vigorously denied throughout this litigation that the parties had any such oral agreement to share the Skodaexport fees.[4]

In the context of these somewhat confusing personal and professional financial interactions, Aboudaram and de Groote executed the two promissory notes that initiated this litigation and are the focus of the current motions. In the first, dated December 19, 1995, de Groote promised to pay on demand "to the order of Conseil Alain Aboudaram S.A. . . . the principal sum of $400,000 or, if less, the aggregate principal amount of all advances hereunder by the Lender to the Borrower (including advances made prior to the date hereof), outstanding at the time of such demand, together with interest" at a set rate. First Am. Compl. Ex. A. The note identified CAASA as the "Lender" and de Groote and his wife, collectively, as the "Borrower."[5] Id. The note further provided that "[a]ll advances made by the Lender to the Borrower hereunder and all payments made on account of principal hereof, shall be recorded by the Lender and, prior to any transfer hereof, endorsed on the grid attached hereto which is part of this Demand Promissory Note." Id. The note was secured by a deed of trust "granted by the Borrower to the Lender and covering the premises having the address of 1675 34th Street, N.W., Washington,

---

[3] The parties have stipulated that CAASA's receipts from SkodaExport totaled $8,874,497.70, one-third of which is $2,958,165.90. Stipulated Ex. 4.

[4] At trial, Aboudaram testified that his personal efforts to help de Groote with his mortgage "had nothing to do" with any Skodaexport-related compensation for de Groote. Tr. Feb. 24, 2004, at 74.

[5] Although Mrs. de Groote is named as a borrower in both promissory notes, de Groote asked that she not be made to sign them, and Aboudaram, arguably on CAASA's behalf, agreed. Tr. Feb. 26, 2004, at 75.

D.C." – de Groote's Washington home. Id. Finally, the note provided that it was to be "governed by and construed in accordance with the laws of the State of New York." Id. A second promissory note, dated October 13, 1998, with a face value of $100,000, is similar to the first in all other relevant regards. See First Am. Compl. Ex. B.

According to Aboudaram, he and de Groote understood that the promissory notes would cover Aboudaram's personal loans to de Groote as well as any loans made by CAASA.[6] Tr. Feb. 26, 2004, at 75-76 ("[de Groote] knew perfectly well at the time that he signed that promissory note that the promissory note would cover all the monies that I had paid personally from my own pocket . . . and that I would pay subsequently"); Tr. Feb. 23, 2004, at 60 ("I said I lent the money. I repeat I lent the money personally."). Aboudaram testified at trial that his goal was to have his company act on his behalf should collection efforts ever be required. See id.; Tr. Feb. 23, 2004, at 65-66.[7] The promissory notes were drawn up for CAASA by Isam Salah ("Salah"), an attorney with the firm of King & Spalding. At trial, Salah testified that he had carefully drafted the notes, stated that the notes "[define] CAASA as the lender," Tr. Feb. 23, 2004, at 93, and confirmed that

---

[6] At trial, Aboudaram denied that CAASA ever made any advances to de Groote under the promissory notes. See Tr. Feb. 23, 2004, at 62. That notwithstanding, the Court credits the stipulated agreement of the parties that CAASA made some payments to de Groote – totaling 31,089.78 Swiss Francs or approximately $25,000 – as loans under the promissory notes. See Stipulated Ex. 3; Tr. Feb. 23, 2004, at 47. These de Groote has repaid. Stipulated Ex. 3.

[7] A relevant colloquy between Aboudaram and counsel for de Groote was as follows:

"Q. . . . When the company pursued enforcement action against Jacque[s] de Groote, was the company fronting for Alain Aboudaram?

A. Yes, they were.

Q. And it's still fronting for Alain Aboudaram today?

A. Yes. I said it in my deposition. Mr. de Groote was my friend, and I did not want to pursue him. And he knew that from the very beginning when we did the notes. This is why the notes were done in the name of the company."

Tr. Feb. 23, 2004, at 65.

the notes "evidence[d] a debt owed by the borrower to the lender." Id. at 90.

De Groote's testimony about the intended scope of the promissory notes differed importantly from Aboudaram's. De Groote insisted that he did not understand Aboudaram's personal advances to be covered by the promissory notes. See Tr. Feb. 24, 2004, at 12-13. Instead, de Groote testified that he had expected to receive a promissory note naming Aboudaram as the lender as to the personal loans, which he admittedly still owed. Id. at 12-13, 17. When he saw that the notes named CAASA as the lender, de Groote understood them to apply exclusively to advances made to him on his account with CAASA. However, he also said that he viewed Aboudaram as the ultimate source of all the payments at issue.[8] Id. at 13. The notes represented, in his thinking, "a sort of line of credit" which could cover past and future advances made by Aboudaram through CAASA. Id. at 16.

CAASA and de Groote, the parties to this action, agree that de Groote had by the end of 2000 transferred approximately $200,000 to CAASA, although de Groote does not now characterize those remittances as payments under the promissory notes.[9] See id. at 30; compare

---

[8] De Groote's testimony on this subject was anything but clear. He said that by signing the documents he had promised to repay CAASA, not Aboudaram. "But," he continued, "that didn't mean that I understood that I owed [money to] CAASA. I owed money to Mr. Aboudaram. He made advances which had been made by CAASA." Id. at 13. And when asked why he signed the second promissory note, de Groote answered that he did so "[b]ecause Mr. Aboudaram had advanced me additional funds to pay my mortgage." Id. at 15.

[9] At a deposition just before the trial of this case, Annie Aboudaram, Aboudaram's daughter and an employee of CAASA, testified that, sometime in 1998 or 1999, Aboudaram assigned his right to collect de Groote's repayment of his personal loans to CAASA. Tr. Feb. 23, 2004, at 7. While no formal proof of assignment was produced, CAASA sought to introduce into evidence a letter from Aboudaram to CAASA instructing the company to undertake collection efforts on de Groote's account. The Court excluded this letter from the evidence presented at trial because it had been mentioned for the first time in CAASA's opening statement and had at no point been produced in discovery, although it was plainly within the scope of discovery requests

Pl.'s Supp. Mem. [Docket No. 140] at 3 n.2 and Joint Pre-Trial Statement at 6. Those payments notwithstanding, CAASA itemized its damages as follows: $421,576.67 as unpaid principal under the promissory notes, $96,902.58 in interest, and $1,863,348.41 in expenses of enforcement, for a total of $2,381,827.66. Joint Pre-Trial Statement at 14.

ANALYSIS

A. Applicable Legal Standards

Pursuant to FED. R. CIV. P. 15(b), CAASA moves to conform its complaint to the evidence presented at trial – evidence that, according to CAASA, demonstrates that the notes would have identified Alain Aboudaram as the source of funds to be repaid under the notes but for a drafting error.[10] Rule 15(b) provides, in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

FED. R. CIV. P. 15(b). "The decision whether to grant or deny leave to amend is within the sound

---

and its existence had been known to CAASA for some weeks before trial. Id. at 10-11. Annie Aboudaram was forbidden from testifying at trial as to any assignment or similar transaction between CAASA and Aboudaram. Id. at 31.

[10] In the same vein, CAASA seeks reformation of the promissory notes. New York law recognizes that "equity will reform an instrument that, by mistake, does not reflect the agreement reached between the parties." Pacwest, Ltd. v. Resolution Trust Corp., 1996 U.S. Dist. LEXIS 8057, *10 (S.D.N.Y. June 11, 1996) (quoting Lent v. Cea, 209 A.D. 2d 820, 820 (N.Y. App. Div. 1994)). The courts refer to this situation as "scrivener's error" and have held that, "[w]here there is no mistake about the agreement, and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected. Thus, when parties have a real and existing agreement on particular terms and then subsequently find themselves signatories to a writing which does not accurately reflect the agreement reached, the error may be corrected by reforming the contract so that it will accurately reflect the intentions of the parties." Lent, 209 A.D. 2d. at 820.

discretion of the trial court and may be reversed only if it is a clear abuse of discretion." Fed. Nat'l Mortgage Ass'n v. Comm'r of Internal Revenue, 896 F.2d 580, 588 (D.C. Cir. 1990). Where consent to litigate an issue not raised in the pleadings is express, a stipulation or pretrial order may suffice as a basis for amendment pursuant to Rule 15(b). "Implied consent, however, is much more difficult to establish and seems to depend on whether the parties recognized that an issue not presented by the pleadings entered the case at trial. If they do not, there is no consent and the amendment cannot be allowed." 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1493 (3d ed. 2004). Consent is generally found when evidence on the disputed issue is introduced without objection, or where the party opposing amendment actually produced evidence regarding the new issue. Id.; see also Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 842 (D.C. Cir. 1950) (it must be "clear that the parties understand exactly what the issues are when the proceedings are had"); Conair Corp. v. NLRB, 721 F.2d 1355, 1372 (D.C. Cir. 1983) ("The introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue.") (internal citations omitted). Additionally, the Court must consider whether the non-movant "would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory." Browning Debenture Holders Comm. v. DASA Corp., 560 F.2d 1078, 1086 (2d Cir. 1977).

De Groote, reasoning that the promissory notes as written give rise to no obligation between himself and Alain Aboudaram, has moved for judgment as a matter of law pursuant to

FED. R. CIV. P. 50(b).[11] A motion for judgment as a matter of law may be granted "where a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED. R. CIV. P. 50(a)(1). A renewed motion for judgment as a matter of law should not prevail, and the jury's verdict must stand, unless "the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided" that reasonable jurors could not disagree on the verdict. Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1227 (D.C. Cir. 1983) (quoting Coburn v. Pan Am. World Airways, Inc., 711 F.2d 339, 342 (D.C. Cir. 1983)); see also Vander Zee v. Karabatsos, 589 F.2d 723, 726 (D.C. Cir. 1978). The evidence must be viewed in the light most favorable to the party opposing the motion, who enjoys "every fair and reasonable inference that the evidence may justify." Carter, 727 F.2d at 1227; see also Bolden v. J&R Inc., 2001 U.S. Dist. LEXIS 3231, *2 (D.D.C. Mar. 1, 2001). However, de Groote's Rule 50(b) motion must be assessed bearing in mind that "[u]nder New York law, the initial interpretation of a contract is a matter of law for the court to decide. Alexander & Alexander Servs. v. These Certain Underwriters at Lloyd's, 136 F.3d 82, 86 (2d Cir. 1998).[12]

B. Motion to Amend

CAASA argues that de Groote impliedly consented to the trial of factual issues that are grounds for reformation of the promissory notes. Pl.'s Mot. to Am. at 3. Specifically, CAASA contends that de Groote did not object to the presentation of evidence tending to show that the

---

[11] Consistent with Rule 50(a), de Groote moved for judgment as a matter of law before submission of the case to the jury. The Court reserved judgment on the motion before submitting the case, and again after a verdict was returned, to allow thorough briefing of the relevant issues.

[12] The posture of the issue raised in deGroote's Rule 50(b) motion is complicated somewhat by the fact that it was not raised by summary judgment motion before trial, but only by Rule 50 motions during and after trial.

promissory notes were meant by both parties to record de Groote's agreement to repay to CAASA advances made by Aboudaram. Id. at 4. CAASA does not now seek to add Aboudaram as a party to this litigation. Pl.'s Rep. [Docket No. 150] at 2. Rather, CAASA asks (1) that its complaint be amended to state a claim for reformation of the promissory notes and (2) that the promissory notes be deemed reformed such that de Groote's promise therein is to pay "advances made hereunder by Alain Aboudaram." Pl.'s Mot. to Am. at 7. De Groote, for his part, denies that he consented to the trial of any issues relevant to reformation of the promissory notes.

The trial record supports neither CAASA's theory of implied consent nor its allegation of scrivener's error. To begin with, de Groote successfully objected to the introduction into evidence of amounts entered onto grids that had been attached to the promissory notes, apparently for recording advances made by Aboudaram personally. These were arguably evidence that such advances were understood to have been made under the promissory notes. At trial, de Groote argued that the figures in the grids were not part of the document actually signed by de Groote; CAASA then consented to their detachment from the promissory notes and exclusion from the record. See Tr. Feb. 23, 2004, at 49. Just as CAASA may have taken a different approach to these grids had it appreciated their importance to a potential claim for reformation, so, too, might de Groote have opposed their introduction on additional or different grounds had the complaint contained a claim for reformation, or responded to the grids with further evidence had CAASA not agreed to their exclusion. Clearly de Groote did not consent to their introduction into evidence, and a decision by the Court to consider the grids at this juncture would certainly prejudice him. Secondly, Salah, the King & Spalding lawyer for CAASA who drafted the promissory notes, gave no testimony to support CAASA's allegation of scrivener's error. Instead,

he testified that he had drawn the notes with care, and that the notes "[define] CAASA as the lender," id. at 93, and confirmed that the notes "evidence[d] a debt owed by the borrower to the lender." Id. at 90. Salah said nothing, in short, to indicate that there was a mistake in the reduction of the parties' agreement to writing. See Lent, 209 A.D. 2d. at 820. Thus, the Court finds no evidence to support CAASA's claim for reformation of the promissory notes, much less any evidence introduced with de Groote's acquiescence from which to imply his consent to the trial of such reformation.

Additionally, CAASA's proposed alteration of the promissory notes fits awkwardly with the fact that advances were actually made to de Groote by CAASA as well as by Aboudaram personally. See Stipulated Ex. 3. Of course, it is equally true that de Groote's theory of the case leaves unanswered several questions raised by the evidence. It is strange, for example, that de Groote paid CAASA close to $200,000 near the end of 2000 given that his debt to CAASA was considerably less than that amount – unless he understood his debt to Aboudaram to be payable to CAASA. And certainly it is curious that, in numerous communications between CAASA and de Groote, de Groote did not seem to dispute that he was indebted under the notes to CAASA for amounts received from Aboudaram. See Pl.'s Rep. [Docket No. 150] at 9 n.4.

All that notwithstanding, the Court simply cannot conclude that the promissory notes, "*by mistake*, do[] not reflect the agreement reached between" CAASA and de Groote. Lent, 209 A.D. 2d at 820 (emphasis added). As discussed *infra*, it is certainly plausible that Aboudaram and de Groote had an agreement as to the repayment of funds advanced by Aboudaram apart from the promissory notes. The evidence cited by CAASA as proof that de Groote was in Aboudaram's debt, however, does not establish an error in the integration of the notes, particularly not in the

face of the firm insistence by Salah that the notes were drafted with care and reflect a debt owed by deGroote to CAASA (the "Lender"), and the absence of any testimony regarding mutual mistake at trial. As discussed further *infra*, Aboudaram's personal claims against de Groote may share a common factual nexus with CAASA's claims under the promissory notes. But CAASA has not shown that de Groote consented to trial of the claim that the promissory notes failed to capture the agreement between CAASA and de Groote. Accordingly, CAASA's motion to amend the complaint to add a count for reformation of the promissory notes – and to deem the notes reformed to cover advances made by Aboudaram – is denied.

C. Motion for Judgment

The stubborn, unavoidable fact at the root of de Groote's motion for judgment is that the promissory notes, on their faces, cover only "advances hereunder by the Lender to the Borrower," and unequivocally define CAASA as the Lender. First Am. Compl. Ex. A. While CAASA concedes that the operative language is unambiguous, it urges the Court to consider evidence extraneous to the notes in support of its position that the parties intended the notes to cover advances made by Aboudaram personally. De Groote, resting on the plain language of the notes, insists that the Court must "limit its inquiry to the words of the agreement itself if the agreement sets forth the parties' intent clearly and unambiguously." Stoll v. Epstein, 818 F. Supp. 640, 643 (S.D.N.Y.), aff'd, 9 F.3d 1537 (2d Cir. 1993); see also Chimart Assocs. v. Paul, 66 N.Y. 2d 570, 572-73 (N.Y. Ct. App. 1986).

Initially, the Court considers whether the promissory notes form an integrated agreement between CAASA and de Groote. "Under New York law, a contract which appears complete on its face is an integrated agreement as a matter of law." Municipal Capital Appreciation Partners,

I, L.P. v. Page, 181 F. Supp. 2d 379, 392 (S.D.N.Y. 2002) (quoting Battery Steamship Corp. v. Refineria Panama, S.A., 513 F.2d 735, 738 n.3 (2d Cir. 1975)). The promissory notes do not contain a merger clause or some other expression that they form an integrated agreement between CAASA and de Groote. "Absent a merger clause, whether the writing is an integrated agreement is determined 'by reading the writing in light of surrounding circumstances, and by determining whether or not the agreement was one which the parties would ordinarily be expected to embody in that writing.'" Wilson-Gray v. Feinbert, Ltd., 1990 U.S. Dist. LEXIS 16956, *6 (S.D.N.Y. Dec. 17, 1990).

CAASA contends that "there is no evidence that the promissory notes were intended to be a complete expression of CAASA's and de Groote's financial relationship." Pl.'s Rep. [Docket No. 140] at 8. However, the notes need not capture the entire financial relationship between CAASA and de Groote – and certainly not de Groote's financial relationship with Aboudaram – in order for them to be integrated agreements. De Groote's numerous consulting engagements over the years on CAASA's and Aboudaram's behalf need not, for instance, be reflected in the promissory notes in order for the notes to represent the parties' entire understanding as to a given transaction. See Municipal Capital Appreciation Partners, 181 F. Supp. 2d at 392 ("If the written document appears to contain the engagements of the parties, and to define the object and measure the extent of such engagements then it constitutes the contract between them, and is presumed to contain the whole of that contract.") (internal citations omitted). It may well be that "the promissory notes were part of a larger, more comprehensive agreement between de Groote and Aboudaram," Pl.'s Rep. [Docket No. 140] at 8. That is not to say, however, that the promissory notes are any less binding or complete in their own right if they represent an independent,

informed and explicit agreement between the parties. Cf. Morgan Stanley High Yield Securities, Inc. v. Seven Circle Gaming Corp., 269 F. Supp. 2d 206, 215 (S.D.N.Y. 2003) ("The Agreement appears to be complete on its face. It specifies the identity of the parties, what was to be sold, how the sale was to occur . . . . Additionally, there is no question that Defendant was represented by experienced counsel in drafting the Agreement."). Given the existence of de Groote's debt to CAASA, the role of experienced counsel in drafting the notes, Salah's testimony as to the substance of the notes, and Aboudaram's insistence that CAASA's account with de Groote was separate from Aboudaram's personal transactions, the Court has no reason to conclude that the promissory notes were not integrated agreements as between CAASA and de Groote.[13] CAASA's cause of action in this case, of course, is grounded in the promissory notes, not in some other arrangement.

Next, the Court turns to the interpretation of the promissory notes. "Under New York law, the initial interpretation of a contract is a matter of law for the court to decide." Alexander & Alexander Servs., 136 F.3d at 86 (internal citations omitted). This initial interpretation includes the threshold question whether the terms of the contract are ambiguous. Cable Science Corp. v. Rochdale Village, Inc, 920 F.2d 147, 151 (2d Cir. 1990); Morse/Diesel, Inc. v. Trinity Indus. Inc., 67 F.3d 435, 443 (2d Cir. 1995); Credit Lyonnais, S.A. v. Korea Asset Mgmt. Corp., 2003 U.S. Dist. LEXIS 17082, *15 (S.D.N.Y. Sept. 30, 2003). If the agreement sets forth the parties' intent

[13] Interestingly, CAASA's contention on this score is not that the notes omit some element of the transaction between CAASA and de Groote. Rather, CAASA argues that the notes were part of a larger understanding between Aboudaram and de Groote. While it appears that the notes did play some role in a larger relationship between the two men, Aboudaram is not a party to this action – again, CAASA does not move for his addition to the complaint as plaintiff – and the Court finds no reason to conclude that the promissory notes should be required to state the entire financial relationship between deGroote and CAASA or Aboudaram.

clearly and unambiguously, the Court may not look to extrinsic evidence to determine the parties' obligations under the contract. See Omni Quartz, Ltd. v. CVS Corp., 287 F.3d 61, 64 (2d Cir. 2002); Kass v. Kass, 91 N.Y. 2d 554, 566 (N.Y. 1998) (the question of ambiguity *vel non* must be determined from the face of the agreement, without reference to extrinsic evidence); Stroll, 818 F. Supp. at 643; Vulcan Arbor Hill Corp. v. Reich, 81 F.3d 1110, 1117 (D.C. Cir. 1996). New York law commands that "[e]xtrinsic evidence is inadmissible to vary the terms of an unambiguous contract which purports to express the parties' entire agreement." Weiss v. La Suisse, Societe D'Assurances Sur La Vie, 293 F. Supp. 2d 397, 412 (S.D.N.Y. 2003) (citing Furey v. Guardian Life Ins. Co., 261 A.D. 2d 355 (N.Y. App. Div. 1999)); Petracca v. Petracca, 302 A.D. 2d 576, 576 (N.Y. App. Div. 2003) ("extrinsic or parol evidence is not admissible to create an ambiguity in a written document that is otherwise clear and unambiguous"). Where a contract is ambiguous, however, extrinsic evidence may be considered to determine the parties' intent and to determine the meaning of the language of the contract. See Cibro Petroleum Products, Inc. v. Sohio Alaska Petroleum Co., 602 F. Supp. 1520, 1546 (N.D.N.Y. 1985); Credit Lyonnais, 2003 U.S. Dist. LEXIS at *16-*17 (citing Space Imaging Europe, Ltd. v. Space Imaging L.P., 38 F. Supp. 2d 326, 334 (S.D.N.Y. 1999)).

"An ambiguity arises if the terms of a contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Municipal Capital Appreciation Partners, 181 F. Supp. 2d at 393; see also Lightfoot v. Union Carbide Corp., 110 F.3d 898, 906 (2d Cir. 1997). Inconsistent use of a term throughout an agreement is a classic indicator of

ambiguity. See Federal Ins. Co. v. Am. Ins. Co, 258 A.D. 2d 39, 43 (N.Y. App. Div. 1999). "Only where the language *and* the inferences to be drawn from it are unambiguous" may a district court "construe a contract as a matter of law "and grant judgment accordingly. Cable Science, 950 F.2d at 151; see also Alexander & Alexander Servs., 136 F.3d at 86.

At trial, counsel for CAASA conceded that the phrase "advances made hereunder by the Lender" cannot as a matter of plain language reasonably include advances made by Aboudaram personally. Tr. Feb. 24, 2004, at 89-90; see also Tr. Feb. 23, 2004, at 53. Nonetheless, CAASA urges the Court to interpret the notes as applying to Aboudaram's personal advances on the force of extrinsic evidence received in the case. Id. The Court finds no basis, however, on which to allow extrinsic evidence to alter the plain meaning of the words of the promissory notes; there is simply nothing ambiguous about CAASA's status as the only lender identified in the notes. The words "Lender" and "Borrower" are not, for example, used inconsistently in the notes. Compare Collins v. Harrison-Bode, 303 F.3d 429, 432 (2d Cir. 2002) (concluding that a contract's internally inconsistent references to the identities of the parties to a contract created an ambiguity). Here, it is explicitly CAASA and not Aboudaram in his personal capacity that is identified as the lender under the notes and the party whose advances are to be repaid thereunder.

Turning to the inferences that can be drawn from the context of the relevant integrated agreements, CAASA is clearly right that there is more to the relationship between Aboudaram and de Groote than can be gleaned from the promissory notes themselves. In this action, at least, that is beside the point. Absent an ambiguity in the language of the notes, extrinsic evidence of Aboudaram's personal loans to de Groote is, like evidence of any of the myriad other transactions involving the two men over the years, of little help to CAASA in its effort to enforce the promises

contained in the notes.[14] The Court does not enthusiastically reject CAASA's plausible argument that Aboudaram meant for the notes to represent de Groote's personal indebtedness to him. Certainly that approach would be consistent with the relatively porous boundaries that seem to have existed between Aboudaram and CAASA, and it would square with some of de Groote's otherwise hard-to-explain behavior. For example, a reasonable jury could certainly have found CAASA's explanation for the existence of the second promissory note (that de Groote had

---

[14] In its charge to the jury on contract interpretation, at CAASA's urging the Court gave two instructions from the Standardized Civil Jury Instructions for the District of Columbia. They were as follows:

> § 11-13 Terms of a Contract – Evidence: In determining the terms of a contract, you should first consider what a reasonable person in the position of the parties would have believed was the meaning of the words. Next, you may consider the circumstances that existed at the time the contract was made, including the apparent purpose of the parties in entering into the contract, the history of negotiations leading up to the contract and the statements of the parties about their understanding of the contract. In addition, you may consider the statements of any agent for a party about his or her actions in negotiating or drafting the contract, or about his or her understanding of the language of the contract.
>
> § 11-14 Contract Interpretation – Course of Performance: To determine the meaning of a contract, you must first look at the words and phrases actually in the contract. There is a dispute in this case about the meaning of certain words in the promissory notes. To determine the meaning of the words in dispute, you may consider the conduct of the parties in relation to those disputed words in the contract. You should give great weight to how the parties acted with respect to the disputed contract provision. You should also consider other evidence presented to you about the meaning of the provisions.

Taken together, these instructions may have invited the jurors to conclude that the parties had conceded that the language of the promissory notes was ambiguous, and thus, that extrinsic evidence was admissible to choose among various potential meanings of the phrase "advances by the Lender to the Borrower." However, as de Groote has now convincingly argued, there is ultimately no reason to conclude that the material terms of the promissory notes are susceptible to more than one reasonable interpretation. Accordingly, the Court has no occasion to turn to extrinsic evidence in evaluating the promissory notes. See Alexander & Alexander Servs., 136 F.3d at 86. Given the Court's ruling on deGroote's Rule 50(b) motion, deGroote suffered no prejudice from these instructions.

exhausted the funds available under the first) more believable than de Groote's (that the instruments were merely two separate lines of credit secured by the same asset). However, faced with the unambiguous language of the promissory notes, carefully drafted by competent counsel for CAASA and reasonably consistent with the stated intent of the parties, the Court has no choice under the law but to give the notes effect as they are written -- that is with CAASA, not Aboudaram, as the sole Lender to whom payments are due from deGroote.

Finally, as CAASA argues, the Uniform Commercial Code as adopted by New York permits "[a] course of dealing between the parties and any usage of trade in the vocation or trade in which they are engaged . . . [to] give particular meaning to and supplement or qualify terms of an agreement." NY CLS UCC § 1-205(3). Indeed, the New York courts have found that course-of-performance evidence "is considered to be 'the most persuasive evidence of the agreed intention of the parties.'" Federal Ins. Co., 258 A.D. 2d at 44 (quoting Webster's Red Seal Publs. v. Gilberton World-Wide Publs., 67 A.D. 2d 339, 341 (N.Y. App. Div. 1979)). However, "[t]he express terms of an agreement and an applicable course of dealing . . . shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade." Id. at § 1-205(4). "There can be no argument but that the Uniform Commercial Code restates the well established rule that evidence of usage of trade and the course of dealings should be excluded whenever it cannot be reasonably construed as consistent with the terms of the contract." Brunswick Box Co. v. Coutinho, Caro & Co., 617 F.2d 355, 359 (4th Cir. 1980) (concluding, however, that under Virginia law, a finding of ambiguity is not necessary for the admission of extrinsic evidence concerning the parties' course of dealings).

Here, the unambiguous express terms of the promissory notes must control over any contradictory course-of-dealing evidence. Moreover, CAASA does not explain why provisions of the UCC applicable to contracts for the sale of goods can be applied to the transactions embodied in the promissory notes. Thus, applying the unambiguous language of the contract, it is clear that no reasonable jury could have found that Aboudaram's advances to de Groote were covered by the promissory notes, which by their terms reach only advances from CAASA, as the "Lender," to de Groote. Having found based on the stipulation of the parties that all such advances have been repaid, the Court must enter judgment for de Groote on CAASA's claim for breach of contract on the promissory notes.

CONCLUSION

CAASA's motion to amend the complaint shall be denied because de Groote did not expressly or tacitly consent to the trial of issues not raised in the complaint. De Groote's motion for judgment shall be granted because the unambiguous language of the promissory notes between CAASA and deGroote causes them to extend only to debts that have already been repaid. A separate order accompanies this memorandum opinion.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Signed this 7th day of June, 2004.

Copies to:

James Lee Marketos
Alexander Craig Vincent
Mary-Ellen Noone
BERLINER, CORCORAN & ROWE, L.L.P.
1101 17th Street, NW
Suite 1100
Washington, DC 20036-4798
(202) 293-5555
Fax : 202-293-9035
Email: jlm@bcr-dc.com

Brian H. Corcoran
KATTEN MUCHIN ZAVIS & ROSENMAN
1025 Thomas Jefferson Street, NW
Suite 700 East Lobby
Washington, DC 20007-5201
(202) 625-3679
Fax : 202-298-7570
Email: brian.corcoran@kmzr.com

Stephen Sale
CLAXTON, SALE & QUINN, P.C.
910 16th Street, N.W.
Fifth Floor
Washington, DC 20006
(202) 833-4170 (phone)
Fax: (202) 887-5137